

THE HONORABLE RICHARD A. JONES

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

COLUMBIA CASUALTY COMPANY, an
Illinois corporation,

Plaintiff,

v.

SEATTLE CHILDREN'S HEALTHCARE
SYSTEM, a Washington corporation,

Defendant,

v.

LEXINGTON INSURANCE COMPANY, a
foreign corporation; EVANSTON INSURANCE
COMPANY, a foreign corporation; NATIONAL
FIRE & MARINE INSURANCE COMPANY, a
foreign corporation; IRONSHORE SPECIALTY
INSURANCE COMPANY, a foreign
corporation; STEADFAST INSURANCE
COMPANY, a foreign corporation;
HOMELAND INSURANCE COMPANY, a
foreign corporation; and ILLINOIS UNION
INSURANCE COMPANY, a foreign
corporation,

Cross-Defendants.

Case No.: 2:20-cv-00046-RAJ

**CROSS-DEFENDANT NATIONAL
FIRE & MARINE INSURANCE
COMPANY'S ANSWER TO
DEFENDANT'S CROSS-CLAIMS**

CROSS-DEFENDANT NATIONAL FIRE & MARINE
INSURANCE COMPANY'S ANSWER TO DEFENDANT'S
CROSS-CLAIMS - 1
CASE NO.: 2:20-CV-00046-RAJ

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COMES NOW Cross-Defendant National Fire & Marine Insurance Company (“NFMIC”) in answer to Defendant Seattle Children’s Healthcare System’s (“SCH”) *First Amended Answer, Cross-Claims, and Counterclaims* avers as follows:

X. COUNTERCLAIM FOR DECLARATORY RELIEF

A. Introduction

1. NFMIC admits the allegations in Paragraph 1.

2. NFMIC denies that the outcome of Columbia’s declaratory judgment claims will have a direct impact on the defense and indemnity coverage available under the policies that NFMIC issued to SCH. NFMIC further denies that there is any risk of inconsistent outcomes that would require joining NFMIC as a party to this lawsuit. NFMIC lacks information sufficient to form a belief as to the truth or falsity of the remaining allegations in Paragraph 2 and, therefore, denies each of those allegations.

B. Parties

3. NFMIC lacks information sufficient to form a belief as to SCH’s status as a not-for-profit corporation and therefore denies that allegation. NFMIC admits the remaining allegations in Paragraph 3.

4. NFMIC lacks information sufficient to form a belief as to the truth or falsity of the allegations in Paragraph 4 and, therefore, denies each of those allegations.

5. NFMIC lacks information sufficient to form a belief as to the truth or falsity of the allegations in Paragraph 5 and, therefore, denies each of those allegations.

6. NFMIC lacks information sufficient to form a belief as to the truth or falsity of the allegations in Paragraph 6 and, therefore, denies each of those allegations.

7. NFMIC admits the allegations in Paragraph 7.

8. NFMIC lacks information sufficient to form a belief as to the truth or falsity of the allegations in Paragraph 8 and, therefore, denies each of those allegations.

1 9. NFMIC lacks information sufficient to form a belief as to the truth or falsity of
2 the allegations in Paragraph 9 and, therefore, denies each of those allegations.

3 10. NFMIC lacks information sufficient to form a belief as to the truth or falsity of
4 the allegations in Paragraph 10 and, therefore, denies each of those allegations.

5 11. NFMIC lacks information sufficient to form a belief as to the truth or falsity of
6 the allegations in Paragraph 11 and, therefore, denies each of those allegations.

7 **C. Jurisdiction and Venue**

8 12. NFMIC lacks information sufficient to form a belief as to the truth or falsity of
9 the allegations in Paragraph 12 and, therefore, denies each of those allegations.

10 13. NFMIC denies that there is an actual controversy between itself and SCH or
11 that there is subject matter jurisdiction with respect to the claims against NFMIC. NFMIC
12 lacks information sufficient to form a belief as to the truth or falsity of the remaining
13 allegations in Paragraph 13 and, therefore, denies each of those allegations.

14 14. NFMIC admits that it has conducted business and sold policies to SCH in
15 Washington; that SCH is domiciled in Washington; and that the Court has personal jurisdiction
16 over NFMIC. NFMIC lacks information sufficient to form a belief as to the truth or falsity of
17 the remaining allegations in Paragraph 14 and, therefore, denies each of those allegations.

18 15. NFMIC admits the allegations in Paragraph 15.

19 16. NFMIC denies that it is a necessary party to this action. NFMIC lacks
20 information sufficient to form a belief as to the truth or falsity of the remaining allegations in
21 Paragraph 16 and, therefore, denies each of those allegations.

22 17. NFMIC denies that failure to include NFMIC as a party would leave SCH
23 subject to a substantial risk of incurring inconsistent rights and obligations. NFMIC lacks
24 information sufficient to form a belief as to the truth or falsity of the remaining allegations in
25 Paragraph 17 and, therefore, denies each of those allegations.
26

1 18. NFMIC denies the allegations in Paragraph 18 as they pertain to NFMIC.
 2 NFMIC lacks information sufficient to form a belief as to the truth or falsity of the remaining
 3 allegations in Paragraph 18 and, therefore, denies each of those allegations.

4 **D. Factual Background**

5 19. NFMIC admits that Columbia issued Policy No. HMU 1064389726 with a
 6 policy period of 7/1/2017-7/1/2018; Policy No. HMU 1064389726 with a policy period of
 7 7/1/2018-7/1/2019; and Policy No. HMU 1064389726 with a policy period of 7/1/2019-
 8 7/1/2020, except insofar as one digit of the policy number for the 2018-2019 policy is
 9 incorrectly stated in Paragraph 19. NFMIC lacks information sufficient to form a belief as to
 10 the truth or falsity of the remaining allegations in Paragraph 19 and, therefore, denies each of
 11 those allegations.

12 20. NFMIC lacks information sufficient to form a belief as to the truth or falsity of
 13 the allegations in Paragraph 20 and, therefore, denies each of those allegations.

14 21. NFMIC lacks information sufficient to form a belief as to the truth or falsity of
 15 the allegations in Paragraph 21 and, therefore, denies each of those allegations.

16 22. NFMIC lacks information sufficient to form a belief as to the truth or falsity of
 17 the allegations in Paragraph 22 and, therefore, denies each of those allegations.

18 23. NFMIC lacks information sufficient to form a belief as to the truth or falsity of
 19 the allegations in Paragraph 23 and, therefore, denies each of those allegations.

20 24. NFMIC lacks information sufficient to form a belief as to the truth or falsity of
 21 the allegations in Paragraph 24 and, therefore, denies each of those allegations.

22 25. NFMIC admits that Evanston issued Policy No. XS800949 with a policy period
 23 of 7/1/2017-7/1/2018 and Policy No. XS801364 with a policy period of 7/1/2019-7/1/2020.
 24 With respect to the policy period of 7/1/2018-7/1/2019, the policy number is stated incorrectly
 25 in Paragraph 25; rather, Evanston issued Policy No. XS801169 for that period (the three
 26 policies issued by Evanston between 7/1/2017 and 7/1/2020 are referred to herein collectively

1 as the “Evanston Policies”). NFMIC admits that except as otherwise stated in the Evanston
 2 Policies, the coverage provided by those policies follows the agreements, terms, conditions,
 3 definitions, exclusions and endorsement of the underlying Columbia policies. NFMIC denies
 4 the remaining allegations in Paragraph 25.

5 26. NFMIC admits that it issued Policy No. 42-XHC-303637-01 for the period of
 6 7/1/2017-7/1/2018; Policy No. 42-XHC-303637-02 for the period of 7/1/2018-7/1/2019; and
 7 Policy No. 42-XHC-303637-04 for the period of 7/1/2019-7/1/2020 (together, the “NFMIC
 8 Policies”). NFMIC denies the remaining allegations in Paragraph 26.

9 27. NFMIC lacks information sufficient to form a belief as to the truth or falsity of
 10 the allegations in Paragraph 27 and, therefore, denies each of those allegations.

11 28. NFMIC lacks information sufficient to form a belief as to the truth or falsity of
 12 the allegations in Paragraph 28 and, therefore, denies each of those allegations.

13 29. NFMIC lacks information sufficient to form a belief as to the truth or falsity of
 14 the allegations in Paragraph 29 and, therefore, denies each of those allegations.

15 30. NFMIC admits the allegations of Paragraph 30 as they pertain to the *Wills* class
 16 action. NFMIC lacks information sufficient to form a belief as to the truth or falsity of the
 17 remaining allegations in Paragraph 30 and, therefore, denies each of those allegations.

18 31. NFMIC admits the allegations in Paragraph 31.

19 32. NFMIC lacks information sufficient to form a belief as to the truth or falsity of
 20 the allegations in Paragraph 32 and, therefore, denies each of those allegations.

21 33. NFMIC admits that Columbia’s Complaint asserts that a “Fungi and Microbes”
 22 exclusion bars coverage under Columbia’s 2019-2020 policy. NFMIC lacks information
 23 sufficient to form a belief as to the truth or falsity of the remaining allegations in Paragraph 33
 24 and, therefore, denies each of those allegations.

25 **E. Claim for Declaratory Judgment**

26 34. NFMIC incorporates by reference the responses to paragraphs 1 through 33.

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1 35. NFMIC denies each of the allegations in Paragraph 35 as they pertain to
2 NFMIC. NFMIC lacks information sufficient to form a belief as to the truth or falsity of the
3 remaining allegations in Paragraph 35 and, therefore, denies each of those allegations.

4 36. NFMIC denies each of the allegations in Paragraph 36 as they pertain to
5 NFMIC. NFMIC lacks information sufficient to form a belief as to the truth or falsity of the
6 remaining allegations in Paragraph 36 and, therefore, denies each of those allegations.

7 37. NFMIC admits that it cannot be bound to a judgment in an action to which it is
8 not a party. NFMIC denies the remaining allegations in Paragraph 37.

9 38. NFMIC denies each of the allegations in Paragraph 38 as they pertain to
10 NFMIC. NFMIC lacks information sufficient to form a belief as to the truth or falsity of the
11 remaining allegations in Paragraph 38 and, therefore, denies each of those allegations.

12 39. NFMIC denies each of the allegations in Paragraph 39.

13 **F. Need for a Stay of this Litigation**

14 40. NFMIC lacks information sufficient to form a belief as to the truth or falsity of
15 the allegations in Paragraph 40 and, therefore, denies each of those allegations.

16 41. NFMIC lacks information sufficient to form a belief as to the truth or falsity of
17 the allegations in Paragraph 41 and, therefore, denies each of those allegations.

18 42. NFMIC denies each of the allegations of Paragraph 42 as they pertain to
19 NFMIC. NFMIC lacks information sufficient to form a belief as to the truth or falsity of the
20 remaining allegations in Paragraph 42 and, therefore, denies each of those allegations.

21 43. NFMIC denies the allegations of Paragraph 43 as they pertain to NFMIC.
22 NFMIC lacks information sufficient to form a belief as to the truth or falsity of the remaining
23 allegations in Paragraph 43 and, therefore, denies each of those allegations.

24 **[DEFENDANT'S] PRAYER FOR RELIEF**

25 By way of answer, answering cross-defendant opposes Defendant's prayer for relief
26 and asks that Defendant take nothing by this action.

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DEFENSES

By way of further answer to Defendant's Cross-Complaint, by way of stating further defenses whether affirmative or otherwise, NFMIC states and alleges as follows:

1. The Complaint fails to state a claim upon which relief may be granted.
2. NFMIC is not a necessary party to this action. The outcome of the dispute between Columbia and SCH will have no material impact on NFMIC's coverage obligations, and there is no risk of inconsistent rulings. Regardless of whether the Columbia policies provide coverage and regardless of whether the claims "relate back" to earlier claims or policy years, the NFMIC policies do not provide coverage. The NFMIC Policies each provide: "If any 'underlying policy' includes any more restrictive coverage, terms, definitions, exclusions, conditions, or limitations, then this policy will follow the more restrictive provisions of any 'underlying policy.'" With respect to each of the NFMIC Policies, the corresponding Evanston Policy in that year is an "underlying policy." The Evanston Policies each contain the following exclusion (the "Evanston Mold Exclusion"):

MOLD EXCLUSION

In consideration of the premium paid, it is hereby understood and agreed that this policy does not apply to Ultimate Net Loss based upon, arising out of, or in any way involving Mold or Mold Event under any theory of liability whatsoever.

Solely for the purposes of this endorsement:

Mold means any permanent or transient fungus, mold, mildew or mycotoxin, or any of the spores, scents or by-products resulting therefrom that exist, emanate from or move anywhere indoors or outdoors, regardless of whether they are proved to cause disease, injury or damage.

Mold Event means any actual, alleged or threat of contact with, exposure to, existence of, presence of, or inhalation, ingestion, absorption, discharge, dispersal, seepage, migration, release, escape, presence, growth or reproduction of Mold.

The above exclusion shall apply:

- A. to any obligation to share damages with or repay someone else who must pay damages;
- B. to any supervision, instructions, recommendations, warnings or advice given or which should have been given by any Insured or others.

CROSS-DEFENDANT NATIONAL FIRE & MARINE
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1 This exclusion precludes any potential coverage for the Aspergillus Claims, regardless of the
2 outcome of the dispute between Columbia and SCH.

3 3. SCH's claims are barred because the Cross-Complaint does not set forth an
4 actual controversy with respect to NFMIC as required by the Declaratory Judgment Act.

5 4. Alternatively, SCH's claims are barred because the Aspergillus Claims were not
6 first made and reported during the policy periods of the NFMIC Policies.

7 5. Alternatively, SCH's claims are barred because the Aspergillus Claims and/or
8 related claims were the subject of a notice or notices to one or more prior insurers.

9 6. SCH's claims are barred because even if one or more of the Aspergillus Claims
10 were first made and reported during the NFMIC policy periods and were not the subject of any
11 prior notice, the NFMIC Policies incorporate the Evanston Mold Exclusion and would still not
12 provide coverage for the Aspergillus Claims.

13 7. Alternatively, SCH's claims under the 2019-2020 NFMIC policy are barred
14 because that policy also incorporates the Fungi and Microbes Exclusion contained in the
15 underlying Columbia policy.

16 8. SCH's claims are barred because the NFMIC Policies have not in fact been
17 exhausted by payment, in legal currency, of damages by or on behalf of the underlying
18 insurers.

19 9. SCH's claims are barred to the extent that SCH has failed to maintain the
20 underlying policies in full force and effect pursuant to Condition 4 of the NFMIC Policies.

21 10. SCH's claims are barred because SCH failed to provide timely notice of the
22 Aspergillus Claims pursuant to Condition 5 of the NFMIC Policies.

23 11. SCH's claims are barred to the extent that the total underlying limits have been
24 impaired, pursuant to Condition 6 of the NFMIC Policies.

1 12. SCH's claims are barred, in whole or in part, by other terms, conditions,
2 exclusions and limitations in the NFMIC Policies and/or the underlying policies issued by
3 Columbia and Evanston.

4 13. SCH's claims are barred, in whole or in part, to the extent that SCH failed to
5 disclose or misrepresented any facts that were material to the issuance of the NFMIC Policies.

6 14. SCH's claims are barred, in whole or in part, due to SCH's failure to cooperate
7 and to respond to NFMIC's reasonable requests for information regarding the tendered claims.

8 15. SCH's claims are barred to the extent any payments for which it seeks
9 reimbursements were unreasonable, excessive or voluntarily made.

10 16. SCH's claims are barred, in whole or in part, to the extent SCH has impaired
11 NFMIC's right to subrogation, indemnity or contribution.

12 17. SCH's claims are barred, in whole or in part, to the extent equitable doctrines,
13 including but not limited to laches, estoppel, waiver and unclean hands, are determined to
14 apply.

15 **RESERVATION OF RIGHTS TO AMEND**

16 NFMIC reserves the right to amend its answer in any way, including by adding
17 defenses, counter-claims, cross-claims and/or third-party actions as may be necessary as
18 additional facts are obtained through further investigation and discovery.

19 **XI. ANSWERING CROSS-DEFENDANT'S PRAYER FOR RELIEF**

20 WHEREFORE, Cross-Defendant NFMIC respectfully requests that Defendant SCH
21 take nothing from this lawsuit; that the Court dismiss SCH's claims against NFMIC with
22 prejudice and enter judgment against SCH in favor of NFMIC; that the court award NFMIC its
23 fees and costs in this action as permitted by law; and that the court grant such other and further
24 relief, both at law and in equity, to which NFMIC may justly be entitled.

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1 DATED this 29th day of June, 2020.

2 COZEN O'CONNOR

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13 *& Marine Insurance Company*
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CERTIFICATE OF SERVICE

I hereby certify that on June 29, 2020, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all counsel of record.

DATED this 29th day of June, 2020.

COZEN O'CONNOR

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CROSS-DEFENDANT NATIONAL FIRE & MARINE
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